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Nos. 99-1687 and 99-1728

In The

Supreme Court of the United States

GLORIA BARTNICKI, *et al.*,

Petitioners,

v.

FREDERICK W. VOPPER, *et al.*,

Respondents.

UNITED STATES,

Petitioner,

v.

FREDRICK W. VOPPER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* REPRESENTATIVE JOHN A. BOEHNER IN SUPPORT OF PETITIONERS

MICHAEL A. CARVIN*
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

**Counsel of Record*

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INTEREST OF *AMICUS CURIAE*

Amicus John Boehner is a member of the House of Representatives.[1] Representative Boehner has filed suit under 18 U.S.C. § 2511(1)(c) (the "Act") against Representative James McDermott, who has invoked the First Amendment as a defense. Thus, Representative Boehner's suit implicates the same questions presented by petitioners. Additionally, *amicus* submits this brief to present the separate argument that the Act is constitutional as applied to defendants who are public officials, irrespective of its constitutionality as applied to private citizens. A divided panel of the D.C. Circuit, in separate opinions, rejected the First Amendment challenge to the Act. The court of appeals declined to hear the case *en banc*, and a petition for certiorari is pending, *McDermott v. Boehner*, No. 99-1709 (U.S. Apr. 25, 2000).

After illegally intercepting Representative Boehner's telephone conversation with the House Republican leadership over a police scanner, John and Alice Martin met with Democratic Representative Karen Thurman of Florida to discuss the tape and the possibility of receiving immunity for their illegal conduct. Appendix to Petition for a Writ of Certiorari 3a, *McDermott v. Boehner*, No. 99-1709 (U.S. Apr. 25, 2000) ("Mc. Pet. App."). At Representative Thurman's suggestion, the Martins personally delivered the tape on January 8, 1997, to Representative McDermott in his capacity as the ranking member of the House Ethics Committee. Mc. Pet. App. 3a. The Martins' cover letter that accompanied the tape put Representative McDermott on notice of its illegal provenance by stating that the tape contained "a conference call heard over a scanner." Mc. Pet. App. 3a.

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[1] Representative Boehner has received the written consent of all the parties to this action to file this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The letter also indicated that the Martins were under the impression that they would "be granted immunity." Mc. Pet. App. 3a. As Judge Randolph noted, this reference to a promise of immunity gives rise to an inference that the "transaction may have involved a *quid pro quo*" and that McDermott is the "obvious candidate" to have brokered this "illegal transaction." Mc. Pet. App. 23a.

The next day, Representative McDermott gave copies of the tape to *The New York Times*, *The Atlanta Journal-Constitution*, and *Roll Call*. Mc. Pet. App. 3a. The following day, January 10, 1997, *The New York Times* ran a front-page story that included a verbatim transcript of a portion of the illegally intercepted conversation. *The Times* reported that it had received the tape from a "Democratic Congressman hostile to Mr. Gingrich [and who] insisted that he not be identified further." Mc. Pet. App. 6a. Thus, there can be little doubt that Representative McDermott himself distributed copies of the tape to the media. Representative McDermott's distribution of the tape constituted a violation of the Rules of the House Ethics Committee and, consequently, he resigned from that Committee on January 13, 1997.[2]

SUMMARY OF ARGUMENT

The central premise of respondents' challenge to the Act is that there is a First Amendment right to distribute other persons' speech that has been stolen. Such a rule would be antithetical to the core First Amendment principle that free and candid private exchanges are to be

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[2] Notwithstanding the unfounded suggestions made by Representative McDermott, the contents of the tape did not suggest apparent "official misconduct." Rather, as the court of appeals recited, "[t]he participants discussed strategy regarding an expected Ethics Subcommittee announcement of Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the committee's promise not to hold a hearing." Mc. Pet. App. 3a. Plainly, there is nothing improper about such a conversation.

encouraged. In the absence of the Act's prohibition on the dissemination of illegally intercepted speech, free speech would be chilled by the fear of subsequent public disclosure of private communications. Thus, while the parties will debate the appropriate level of scrutiny to be applied in this challenge to the Act's constitutionality, the essential point is that there is no First Amendment right to distribute someone else's pilfered speech.

This Court's precedents confirm this unassailable proposition. The Court has uniformly upheld content-neutral restrictions on the dissemination of lawfully-obtained, truthful information – particularly other person's speech – in a variety of contexts, including copyrighted material, insider information, the existence of a wiretap, or a religious group's membership list obtained in civil discovery.

The Court's decision in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), is not to the contrary. In that case, the Court simply held that strict scrutiny was appropriate for a *content-based* restriction on the media's *republication* of a private embarrassing *fact* provided to the newspaper by the *government*. *Florida Star* has no relevance to the instant cases because the analysis there extended only to information that was "lawfully obtained." 491 U.S. at 533. Representative McDermott and respondents did not lawfully obtain tapes they disclosed because they came into possession of them through illegal transactions. Specifically, it was illegal for the defendants' sources to intercept the conversation and also illegal for them to disclose the conversation to defendants. In addition, the statute in *Florida Star* was content-based while the Act is plainly content-neutral, and unlike the Florida statute, which advanced no First Amendment interest, the Act promotes the First Amendment interest in preserving citizens' right to free and candid private discussion. In light of this important governmental interest which the Act serves, there is no doubt that it satisfies intermediate scrutiny, which is the most stringent standard of scrutiny that could be reasonably applied to the Act. In any event, under this Court's decision in *United States v. Aguilar*, 515 U.S. 593, 606 (1995),

the Act plainly may be applied to Representative McDermott because he is a public official upon whom special duties of nondisclosure may be imposed.

ARGUMENT

I. There Is No First Amendment Right To Disseminate Someone Else's Stolen Speech.

The Third Circuit's invalidation of the Act's disclosure prohibition necessarily rests on a fundamentally erroneous premise: the notion that there is a First Amendment right to publicly disclose *someone else's* stolen private speech that is even roughly analogous to the right to engage in one's *own* speech. But the two situations are not remotely comparable, and the Court has never treated them as such. The fact that a book reviewer has a virtually absolute First Amendment right to criticize *The Catcher in the Rye* in no way suggests that he has any right to "fence" bootleg copies of J.D. Salinger's book. Or, to use a case the Court has already decided, the fact that *The Nation* magazine has a virtually absolute right to offer its own opinions or facts about former President Ford in no way suggests that it may disclose copies of President Ford's copyrighted speech. *Harper & Row, Publishers, Inc. v. Nation Enterprises, Inc.*, 471 U.S. 539 (1985). Even more obviously, no one has a First Amendment right to disclose the *private* conversations of Mr. Salinger or President Ford, regardless of whether those conversations concern mundane domestic matters or important affairs of state.

This is because, while prohibiting a citizen from engaging in his own speech conflicts with core First Amendment values, a prohibition against disclosing other persons' stolen speech advances and facilitates important First Amendment values. The societal interest in preserving the confidentiality of private conversations, in other words, is itself an important First Amendment interest. There is a well-recognized First Amendment "freedom *not* to speak publicly." *Id.* at 559 (emphasis in original). Absent an ability to keep private speech private, citizens will be

chilled in such conversations and refrain from speech they would otherwise engage in, for fear of public disclosure.

Thus, the First Amendment respects and protects the speaker's interest in selecting and limiting the audience that will receive his message. For example, under copyright laws and state common law analogues, a speaker may limit his audience to paying customers. *See Harper & Row*, 471 U.S. 539; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). Just as a "corollary of the right to associate is the right not to associate" with unwanted members, a corollary of the right to speak is a "First Amendment right to exclude" an unwanted audience from hearing the speech. *California Democratic Party v. Jones*, 120 S. Ct. 2402, 2408-09 (2000). *See also Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2451 (2000) (The " '[f]reedom of association . . . plainly presupposes a freedom not to associate' " and thus "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association.") (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). Just as exposure of those who privately belong to a controversial organization has a "deterrent effect" on one's right to associate, so too does public exposure of one's private speech "chill" that speech. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958). *See id.* at 462 ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."). Just as the appropriation of one's copyrighted speech will lead to less speech because it eliminates the speaker's "economic incentive," so too does appropriation of private conversations deter the candid, private flow of information. *Harper & Row*, 471 U.S. at 558.

Thus, prohibiting the unwanted disclosure of private speech furthers free expression by avoiding the chill on private speech that necessarily is engendered when it is made public to persons the speaker has deliberately sought to exclude. This is, of course, precisely the reason that certain important private conversations – with attorneys or clergy or the like – are absolutely privileged against disclosure, even though such privileges frustrate

society's compelling interest in uncovering even heinous criminal activity. Indeed, the text of the Constitution itself, in the Speech and Debate Clause, protects the conversation illegally disclosed by Representative McDermott here precisely to avoid chilling candid conversation about important legislative matters. *See* U.S. CONST. art. I, § 6; *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951). *See also Nixon v. United States*, 418 U.S. 683, 708 (1974) ("The expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.").

Thus, society has a *stronger* interest in protecting conversations among congressional leaders, or the President and his advisers, than it does in more mundane conversations among private citizens, even though the public is more "interested" in the content of these official conversations. The reason that such conversations are of special "public interest" is precisely the same reason they have special protections: they involve important matters of state. Consequently, the cost of chilling such conversations is proportionately higher. Since the Constitution itself commands that congressional conversations not be exposed regardless of society's interest in knowing the content of the conversations, the Constitution has already established that the need for confidentiality in such conversations outweighs any public interest in uncovering them.

Moreover, although speech amongst public leaders is entitled to special protection against unwelcome surveillance and disclosure, the government has a paramount interest in so protecting *all* conversations in circumstances where citizens have a reasonable expectation of privacy. Protection of such private conversations is an integral part of the "broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.' " *Hill v.*

Colorado, 120 S. Ct. 2480, 2489 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). This interest is shattered by either public or private eavesdroppers, as well as those who disclose the fruits of such surreptitious surveillance. Indeed, since the Constitution itself forbids public actors from eavesdropping on private telephone conversations, and forbids the subsequent disclosure of those conversations in judicial proceedings, it inexorably follows that government has a compelling interest in preventing the disclosure of such conversations by private actors. *See Katz v. United States*, 389 U.S. 347 (1967).

In short, the Act's prohibition against unauthorized disclosure of private conversation facilitates *more* speech and thus enhances the free flow of information and ideas that the First Amendment was designed to nurture and protect. For this reason, it would be contrary to important First Amendment values to constitutionally immunize those who disclose others' private conversations. Representative McDermott has an absolute right to offer his own opinions or facts about the House Republican leadership because, under the First Amendment, McDermott is master of his own speech. But, under the First Amendment, Representative Boehner is also the master of *his* speech and Representative McDermott's disclosure denies him the freedom not to speak publicly. Thus, McDermott's disclosure harms important First Amendment values by chilling Boehner's private speech. On the other hand, McDermott has no cognizable First Amendment right to disclose Boehner's speech because he obtained it only in violation of a law that even McDermott concedes is perfectly constitutional, *i.e.*, the Act's prohibition against the Martin's disclosing their illegally-intercepted conversation to McDermott or anyone else. Indeed, McDermott has no greater First Amendment "right" to disclose the tape of the purloined phone call than does one who "fences" videotapes or books without the creator's consent. For, unlike an *authorized* bookseller or tape vendor, those who disclose the *stolen* speech of others do so at the expense of the

creator's right to select and limit his audience. Consequently, there is no coherent weighing of First Amendment interests that would lead to invalidation of the Act.

Indeed, both McDermott and the Third Circuit effectively concede this basic point. Both seem to agree that the government may prohibit disclosure of illegally-intercepted speech, so long as the disclosure prohibition is applied to those, like the Martins, who illegally intercepted the phone call. Mc. Pet. App. 30a (Ginsburg, J., concurring); *Bartnicki v. Vopper*, 200 F.3d 109, 115-16 (3d Cir. 1999). This concession is fatal. Since the government may *separately* punish the thief for disclosing the phone call (in addition to punishing the interception), it certainly can also prohibit a "fence" from engaging in precisely the same disclosure. There is no coherent reason to erect separate rules for the thief and the fence. The thief has the same First Amendment rights as the fence, since there is no "bad person" exception to the First Amendment. The fence, like the thief, knows the phone call was illegally intercepted and possesses a tape of the call only by virtue of the thief's dual illegalities. Precisely the same societal interest in confidentiality is furthered by prohibiting the fence's disclosure as is furthered by preventing the thief's disclosure. Consequently, since all agree that the government may constitutionally prohibit the thief from disclosing the call, then it necessarily may also prohibit the fence from doing so.

All of the foregoing is plainly and firmly established by this Court's precedent. The Court has uniformly upheld every content-neutral prohibition against disclosing information that was obtained, as here, either through an illegal transaction or pursuant to a duty of nondisclosure. The Court has only invalidated content-based statutes prohibiting the republication of information that the discloser was not prohibited from obtaining and/or that was provided to the discloser by the government itself.

II. This Court's Precedents Establish The Act's Constitutionality.

The Court's decision in *Harper & Row*, on all fours with the instant case, conclusively demonstrates that the Act is fully constitutional. There, an unnamed source had given *The Nation* magazine a "purloined" copy of President Ford's then-unpublished autobiography and *The Nation* immediately published substantial excerpts. 471 U.S. at 542. *The Nation* argued that its conduct was protected by the First Amendment given the enormous public interest and news value in President Ford's story, particularly his first-hand account of why he had pardoned ex-President Nixon. The Court had no trouble rejecting defendant's First Amendment argument and finding *The Nation* fully liable. 471 U.S. at 555-60.

The Court reasoned that *The Nation*'s disclosure of the copyrighted material violated President Ford's "right not to speak" to an audience beyond that which he had selected. *Id.* at 559. As the Court emphasized:

> "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."

Id. (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250 (N.Y. 1968)) (emphases in original). Similarly, the Court in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), upheld a damages award against a television station for its broadcast of a "human cannonball" act in a "public interest" news show, where the publication infringed a state law "right of publicity."

Thus, it is clear that the government may prohibit disclosure of other persons' speech, on pain of civil damages, without raising any serious First Amendment concerns. This establishes the Act's constitutionality since all the Act does is extend a copyright over the contents of

phone calls to the participants in the call and requires the payment of civil damages by those who disclose the contents.[3]

Indeed, this is a far easier case than *Harper & Row* or *Zacchini* because those cases did not involve disclosure of speech that was intended to be kept private. The speech in those cases was already, or soon to be, quite public. The only chilling effect of the unauthorized disclosure was to reduce the speaker's financial gain by broadening the audience beyond paying customers. Here, in contrast, the intrusion is far greater since the disclosure publicly reveals speech that was never intended to be public and the chilling effect is not simply monetary.

The Court has also made clear in numerous other contexts that the law may unilaterally prohibit disclosure of lawfully-obtained, truthful information if the nondisclosure requirement focuses on the means by which the information was acquired, rather than its content. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), for example, the Court unanimously upheld a prior restraint on a newspaper's truthful disclosure of a controversial religious group's membership information that had been lawfully obtained through civil discovery. Since the First Amendment permits prohibiting disclosure of private information when it is obtained through lawful civil discovery, *a fortiori* the government may prohibit disclosure of information obtained from one who both illegally acquired it and illegally transmitted it to the discloser. In a multitude of other contexts, the law similarly restricts the disclosure of certain information – grand jury testimony, insider information or trade secrets – and the Court has routinely upheld such duties of nondisclosure.[4] These laws were

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[3] Like the copyright laws, the Act does not limit the disclosure of any "facts" or "ideas," just the content of the phone calls themselves. *See Harper & Row*, 471 U.S. at 560.

[4] *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) ("Although stealing documents or *private wiretapping* could

constitutional even though they unilaterally imposed a disclosure prohibition on defendants who strenuously resisted the duty of nondisclosure and had not voluntarily assumed any fiduciary duty to the person whose information was being disclosed. *See Harper & Row*, 471 U.S. 539; *Zacchini*, 433 U.S. 562, *Seattle Times*, 467 U.S. 20.

III. *Florida Star* Does Not Apply To A Content-Neutral Ban On Disclosing Private Conversations.

As the foregoing makes clear, it is well-established that it is constitutionally permissible to restrict the truthful disclosure of information when the law permissibly treats that information as confidential, regardless of whether those disclosing the information had themselves illegally obtained it. This is particularly true when the information is another person's speech and the purpose of the confidentiality requirement is to facilitate such speech. In the face of all this, Representative McDermott and respondents nonetheless insist that the line of cases culminating in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), grant a nearly-absolute right to knowingly disclose a tape of someone else's phone call even though it was both illegally obtained and illegally transmitted to the defendant. But *Florida Star* and its predecessors never remotely addressed, much less condemned, the government's authority to preserve the

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provide newsworthy information, *neither reporter nor source* is immune from conviction for such conduct, whatever the impact on the flow of news.") (emphases added); *United States v. Aguilar*, 515 U.S. 593, 606 (1995) (upholding criminal conviction of federal judge for disclosing truthful information about a wiretap that he had lawfully obtained); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (upholding damage award against newspaper publishing the name of its source in violation of common law promissory estoppel doctrine); *United States v. O'Hagan*, 521 U.S. 642 (1997) (upholding criminal conviction for violating insider trading obligations); FED. R. CRIM. P. 6(e) (duty of nondisclosure imposed on those required to serve as grand jurors).

confidentiality of private conversations against the chilling effect caused by their illegal interception and disclosure.

Florida Star held that strict scrutiny was appropriate for a *content-based* restriction on the media's *republication* of a private embarrassing *fact* provided to the newspaper by the *government*. It in no way hinted that there was any constitutional problem with a *content-neutral* restriction against disclosing a private *conversation* that the law concededly was entitled to keep private against all outside interlopers. Rather, *Florida Star* did nothing more than treat information inadvertently made public by the government as equivalent to information deliberately made public. Thus, like all other information lawfully possessed by the media, the government normally could not suppress publication because the information was perceived to have a harmful effect on those exposed to the public glare. But this hardly suggests that there is any First Amendment right to disclose all information, particularly when the information sought to be disclosed is other people's speech, when the reason for the nondisclosure requirement is the content-neutral one of preserving the confidentiality of private conversations, and when the government itself is not responsible for disclosing the speech to defendant.

At the most general level, *Florida Star* cannot establish a general First Amendment freedom to disclose *all* information of public importance because (1) *Florida Star* itself repeatedly and forcefully emphasized that "[o]ur holding today is limited" to the "discrete factual context" presented by that case and (2) any such rule of absolute disclosure would be in irreconcilable conflict with the precedent and clearly constitutional laws discussed above. *Florida Star*, 491 U.S. at 541, 530. *See id.* at 531. More specifically, *Florida Star* does not suggest any constitutional infirmity in the Act for a number of independently dispositive reasons.

A. The Disclosed Tapes Were Not Lawfully Obtained.

Most obviously, *Florida Star* does not apply here because it extends only to information that was "lawfully obtain[ed]." 491 U.S. at 533 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)). Representative McDermott and respondents could not lawfully obtain the tapes they disclosed because they possessed them only through *two* illegal transactions. It was illegal for the defendants' sources to intercept the conversations and also illegal for them to disclose the conversations to the defendants. Mc. Pet. App. 23a-24a; 29a-32a (Ginsburg, J., concurring).

Representative McDermott nonetheless argues that he lawfully obtained the tape because the Act prohibited the sources' transmittal of the tape *to* McDermott, rather than prohibiting his receipt of the tape *from* the sources. Petition for a Writ of Certiorari 20, *McDermott v. Boehner*, No. 99-1709 (U.S. Apr. 25, 2000) ("Mc. Pet."). This silly semantic gamesmanship is contrary to English usage, the Court's clear precedents and any coherent First Amendment jurisprudence.

First, normal English usage establishes that information cannot be "lawfully obtained" if, as here, it can only be obtained unlawfully. It matters not whether it is illegal to give the information to the defendant or for the defendant to receive it – in either instance the information has been acquired or obtained unlawfully. *See* Mc. Pet. App. 30a (Ginsburg, J., concurring). During Prohibition, no one "lawfully obtained" liquor, even though the Eighteenth Amendment prohibited only the "*sale* . . . of intoxicating liquors," not their *receipt* by the consumer. U.S. CONST. amend. XVIII, § 1 (repealed 1933) (emphasis added).

Second, the Court's opinions reflect this common sense understanding of the English language. The Court has made clear that the *Florida Star* principle is inapplicable when the disclosed information did not "lawfully come [into the defendant's] hands." *Aguilar*, 515 U.S. at 605 (citing *Smith*, 443 U.S. at 605). Of course, information does

not lawfully come into the defendant's hands if, as here, the source broke the law when he placed the information in defendant's hands. Similarly, *Florida Star* itself states that where, as here, "sensitive information rests in private hands," government may "forbid its nonconsensual *acquisition*," and any "*information so acquired*" is "outside of the *Daily Mail* principle." 491 U.S. at 534 (emphases added). Thus, *Florida Star* focuses on whether the "*information*" was "acquired" illegally, not on whether it was the defendant or the source who committed the illegal act. More directly, in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-71 (1991), the Court held that the *Florida Star* line of cases was inapposite because, although it was not illegal for the newspaper to *receive* the source's name that was subsequently disclosed, the newspaper nonetheless had not "obtained Cohen's name 'lawfully' " because it "obtained Cohen's name only by making a promise that they did not honor" – in violation of Minnesota's common law promissory estoppel doctrine. *Id.* at 671. Here, too, "[u]nlike the situation in *Florida Star*, where the rape victim's name was obtained through lawful access to a police report," the disclosers here had no "lawful access" to phone calls they knew had been illegally obtained by a source who was prohibited from disclosing it to them. *Id.*[5]

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[5] Representative McDermott argues that *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), somehow supports his assertion that information illegally transmitted to a defendant is "lawfully obtained" within the meaning of *Florida Star* and his assertion that *Florida Star*'s strict scrutiny standard applies here. Mc. Pet. 17-18. This is a most peculiar argument, however, because the *Landmark* opinion says absolutely nothing about whether the information was lawfully or unlawfully obtained, or its legal significance, and could not do so because "[t]he record in *Landmark* contained no evidence regarding who supplied the newspaper with information or how they obtained it." Mc. Pet. App. 21a (citing *Landmark Communications, Inc. v. Commonwealth*, 233 S.E.2d 120, 123 n.4 (Va. 1977)). To the contrary, the *Landmark* opinion pointedly refused to provide any general answer to the "broader question" expressly reserved in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975), *i.e.*, "whether the publication of truthful information withheld by law from the public domain is . . . privileged" in the same manner as information made publicly available by the government. *Landmark*, 435 U.S. at 840. So there is no reasonable basis for inferring that the *Landmark* opinion in 1978 somehow magically anticipated and resolved the question of what *Florida Star* meant by "lawfully obtained" nine years later, especially since *Landmark* never discussed that issue and *Florida Star* did not even cite *Landmark* as providing general guidance on how to resolve this issue. Indeed, *Landmark* expressly refused to apply *any* "categorical approach," much less *Florida Star*'s strict scrutiny, and based its decision on a "narrow and limited" balancing test confined to "the circumstances of this case." *Landmark*, 435 U.S. at 829, 837, 838, 840. This is why *Florida Star* did not even list *Landmark* as one of the "trilogy of cases" upon which its strict scrutiny test is premised. *See Florida Star*, 491 U.S. at 530.

Third, Representative McDermott's tortured interpretation of what information is "lawfully obtained" is wholly irrational and antithetical to fundamental First Amendment principles. Under his proposed construction, if the Act had prohibited the discloser from *receiving* the purloined tape, then it would not be "lawfully obtained" within the meaning of *Florida Star* and strict scrutiny would therefore not apply. But a law prohibiting *receipt* of illegally intercepted conversations is obviously *broader* than the Act's prohibition on disclosure and is wholly unnecessary to further the government's interest in prohibiting the illicit disclosure of stolen speech. Separately criminalizing McDermott's receipt is not necessary to prevent further disclosure of the purloined tape – prohibiting the source's transmittal accomplished *that*. Thus, additionally criminalizing receipt would be broader than necessary and, of course, the First Amendment discourages such unnecessarily over-inclusive laws. *See, e.g., NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect."); *Florida Star*,

491 U.S. at 538. Obviously, then, the Court has not (and should not now) formulate a First Amendment rule that requires McDermott's *more* restrictive alternative. The Court should not compel Congress to pass a law going beyond what is needed to prohibit disclosure of stolen conversations in order to further its interest in prohibiting disclosure of stolen conversations.

Fourth, *Florida Star* itself rejects any interpretation of that opinion as applying to situations where, as here, the source has illegally obtained the information and illegally transmitted it to the discloser. Indeed, the *Florida Star* Court was quite clear that:

> The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a *source*, the government may ever punish not only the unlawful acquisition, but the ensuing *publication* as well . . . we have no occasion to address [that issue] here.

491 U.S. at 535 n.8 (second and third emphases added). Of course, a "source" cannot engage in "publication"; only a "newspaper" can. Thus, by its plain and unambiguous terms, *Florida Star* itself says it is not reaching the question of whether a newspaper could be punished for publishing information acquired unlawfully by the source.[6] *See also Branzburg*, 408 U.S. at 691-92 (no matter how great "the

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[6] For this reason, the footnote cannot rationally be interpreted as reserving only the question of whether the thief himself may be punished for the disclosure, as well as the theft. As the *Boehner* opinion noted, footnote eight's citation to *New York Times Co. v. United States*, 403 U.S. 713 (1971), as not resolving the issue reinforces this reading. In that case, the only question reserved by the Court was whether *The New York Times* could be punished for printing the "Pentagon Papers" that their source, Daniel Ellsberg, had illegally acquired. *See* Mc. Pet. App. 18a-19a. It was clear that *The Times* itself had not stolen the Pentagon Papers, so the case did not implicate the issue of whether a thief could be punished for disclosure, as well as theft.

interest of securing news," the First Amendment "does not reach so far as to override the interest of the public in insuring that *neither* reporter *nor source* is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.") (emphases added). Since the *Florida Star* Court expressly did not decide whether its First Amendment test applied where the source had illegally obtained the information, it obviously did not decide, through an implausible definition of "lawfully obtained," that strict scrutiny applied where the source not only illegally obtained the information, but also illegally transmitted it to the defendant.

Even absent the explicit reservation in footnote eight, it is clear that *Florida Star* could not decide this issue because, in that case, it was not illegal for the source of the information either to obtain it *or* to transmit it to the defendant. The source in *Florida Star* was the police themselves, who obviously lawfully possessed the rape victim's name, and the law plainly did not prohibit them from transmitting it to defendant. Rather, as the *Florida Star* opinion emphasized, the statute simply said that "state officials are not *required* to disclose" such names, but nothing in the law *prohibited* the police – or anyone but the media – from disclosing the name. *See Florida Star*, 491 U.S. at 536, 540 (emphasis added). *See* Mc. Pet. App. 31a (Ginsburg, J., concurring). The only potential police illegality in *Florida Star* was that they had "cause[d] or allow[ed] to be . . . published" the name of a sexual offense victim. 491 U.S. at 536. Thus, as Judge Ginsburg noted in *Boehner*, "the transaction in which the [*Florida Star*] newspaper obtained the name was not illegal *per se*; if the newspaper had not later published the name, the police department would have violated no law." Mc. Pet. App. 31a (Ginsburg, J., concurring). Consequently, it is quite clear, as this Court has already noted, that the newspaper in *Florida Star* had "lawful access to [the] police report" containing the rape victim's name. *Cohen*, 501 U.S. at 671. In short, since *Florida Star* did not present the question of information either illegally obtained or illegally transmitted, it could not

resolve the question of information that is obtained pursuant to such dual illegality, particularly since the opinion emphasized that the rule it was articulating was limited to the "discrete factual context" presented there. 491 U.S. at 530.

Finally, *Florida Star* simply cannot be interpreted as requiring that all disclosure prohibitions, except those applied to defendants who are prohibited from receiving the information, require strict scrutiny. Any such interpretation would bring that case into irreconcilable conflict with the other binding precedent, and laws of unquestioned constitutional validity, discussed above. The defendants in *Harper & Row*, *Zacchini* and *Seattle Times* were not prohibited from receiving or possessing the information at issue, yet the Court, applying at most intermediate scrutiny, uniformly upheld the laws or judicial orders prohibiting the disclosure of such information. As this reflects, Representative McDermott's reading of *Florida Star*, when combined with this Court's other precedent, creates a bizarre and unworkable rule of First Amendment jurisprudence: citizens have a *greater* First Amendment right to disclose information that they possess only through two illegal acts of another than they do to disclose information they have lawfully obtained through court order, as in *Seattle Times*. Under this logic, if the defendant's lawful access to information serves a valuable societal purpose – such as enabling a party to prepare a defense in a lawsuit or to serve as a grand juror – the government may restrict disclosure pursuant to, at most, intermediate scrutiny. But if the defendant has no legal access to the information, and his acquisition of the information is contrary to the concededly important public purpose of preserving the confidentiality of private conversations, then the government is somehow completely disabled from preventing disclosure, absent the most extraordinary circumstances. There is simply no rational basis for such an illogical and destructive regime.

B. The Act Is A Content-Neutral Restriction On Disclosing Other People's Speech.

In any event, even assuming the tapes in these cases were "lawfully obtained" within the meaning of *Florida Star*, there is an additional, independent reason why that opinion and its predecessors would not apply to the Act. *Florida Star* and its predecessors all involved content-based restrictions on particular information precisely because its content was believed harmful, while the Act is a content-neutral prohibition on disclosing others' speech. The laws at issue in *Florida Star* and similar cases prohibited the disclosure of certain information, regardless of how it was obtained, because of its content. The Act, in contrast, prohibits disclosure of certain information, regardless of its content, because of how it was obtained.[7] Thus, the Act's purpose was not to limit the free flow of information "because of disagreement with the message [or information] it conveys," but to facilitate the free flow of information by avoiding the chilling effect that occurs when private communications are intercepted and disclosed. *Hill*, 120 S. Ct. at 2486 (quoting *Ward v. Rock Against*

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[7] The Act applies to any phone call known to be illegally intercepted, regardless of whether that phone call concerns every-day matters or weighty public affairs. Conversely, the Act imposes no restriction unless the source of the information was an illegal interception that the defendant had reason to know about. 18 U.S.C. § 2511(1)(c). Accordingly, for example, *participants* in the phone call are free to discuss its content and Representative McDermott would have been equally free to do so if he had been told of the contents by one of the participants. Thus, under the Act, the defendant "may disseminate the identical information covered by [the Act] so long as the information was gained through means independent of [the illegally-intercepted communication]." *Seattle Times*, 467 U.S. at 34. And, of course, McDermott may more generally offer whatever "facts" or "ideas" he has about ex-Speaker Gingrich's ethics, or any other topic, so long as it is not drawn from the tainted source. *See Harper & Row*, 471 U.S. at 560.

Racism, 491 U.S. 781, 791 (1989)). There is a constitutionally dispositive difference between a prohibition against disclosing certain "private *facts*" because its content is embarrassing and a prohibition against disclosing private *speech* to avoid curtailing such speech. *Florida Star*, 491 U.S. at 534 (emphasis added).

Most obviously, the former prohibition is content-based and the Court has always applied "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). *See Cohen*, 501 U.S. at 670 ("In [*Florida Star* and *Daily Mail*], the State itself defined the content of publications that would trigger liability."). But where, as here, "the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from [*United States v.*] *O'Brien* [, 391 U.S. 367 (1968)]." *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) (citation omitted). *See also Turner*, 512 U.S. at 661 (provisions subject to intermediate scrutiny where they "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny.").

In addition, the Act, unlike the *Florida Star* statute, *furthers* First Amendment interests. While the disclosure of a rape victim's name is a serious invasion of privacy, it does not implicate, or chill, any expressive activity by the victim of the disclosure. Thus, the disclosure restriction can be justified only on the ground that the speaker's First Amendment rights are outweighed by the harm to the victim caused by exposing truthful facts about them. In contrast, the government has an interest in preserving private *conversations* that is wholly distinct from, and in addition to, its "interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 & n.25 (1977). The Court has recognized this distinction by invalidating laws which penalize disclosure of private facts, *see, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967), while upholding laws,

such as copyright statutes and the common law right to publicity, which prohibit unauthorized republication of speech in order to avoid deterring it. In short, the Act's disclosure prohibition does not entail a conflict between privacy and free-flowing discussion, but furthers *both* interests by preserving "the citizens' constitutionally protected right to free private discussion." *Halperin v. Kissinger*, 606 F.2d 1192, 1199 (D.C. Cir. 1979), *aff'd*, 452 U.S. 713 (1981).

Finally, *Florida Star* is inapposite because, as that opinion emphasized at every turn, the key fact there was that the *government* released the confidential information, thus making it publicly available prior to the newspaper's disclosure. *See, e.g., Florida Star*, 491 U.S. at 535, 536, 538. As the Court noted, "where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release." *Id.* at 535. It is anomalous because: (1) if the government makes certain information publicly available, it cannot then assert that "a meaningful public interest is served by restricting its further release by other entities, like the press," and (2) "[w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts" – namely, not releasing it in the first place. *Id.* at 535, 534. If the law authorizes public disclosure of information to certain individuals, or the government gives the information to members of the public, it is almost a *non sequitur* to suggest that the information is "private" or that the government has an interest in keeping it so. But where, as here, the government has done everything it can to keep private information private, there is no diminution in the government's interest in confidentiality and no less restrictive way to prevent disclosure of that information. For this reason, as noted, in cases where the government has *consistently* sought to preserve confidentiality, the Court has uniformly upheld content-neutral restrictions on disclosure. Indeed, *Florida Star* itself confirms the government's power to do so. Where, "sensitive

information rests in private hands," the "government retains *ample* means of safeguarding the significant interests upon which *publication* may impinge," by prohibiting such publication. *Id.* at 534 (emphases added).

Looked at another way, even assuming the tapes in these cases were "lawfully obtained" because, as Representative McDermott argues, Congress refrained from prohibiting receipt of the tapes by defendants, the Act may nonetheless impose a duty of nondisclosure on all those who receive the tapes. Such a duty of nondisclosure would be fully constitutional because, as in *Seattle Times*, the defendant's access to the tape was a "matter of legislative grace," since Congress "granted" access by refraining from penalizing receipt, thus allowing the information to be "lawfully obtained." 467 U.S. at 32.

For all of these reasons, the Act is plainly constitutional because it is a content-neutral disclosure restriction precisely tailored to preventing invasions of privacy and the chilling effect caused by disclosure of private communications.[8]

IV. The Act Plainly Survives Intermediate Scrutiny.

For the reasons stated, the Act is subject, at most, to the intermediate scrutiny framework of *O'Brien* that was applied in *Seattle Times*: "Whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' " and

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[8] An additional reason that *Florida Star* does not control is because the Florida law at issue there, unlike the Act, prohibited disclosure by the media alone. *See Florida Star*, 491 U.S. at 540; 491 U.S. at 542 (Scalia, J., concurring). This both weakened any purported interest in protecting rape victims' privacy and, standing alone, "heightened" the level of "First Amendment scrutiny" because "laws that single out the press . . . for special treatment 'pose a particular danger of abuse by the State.' " *Turner*, 512 U.S. at 640 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)).

whether "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Seattle Times*, 467 U.S. at 32 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)). *See O'Brien*, 391 U.S. at 377; *Turner*, 512 U.S. at 662. The Act easily survives such review.

The Act's infringement on defendants' speech is virtually nonexistent, if cognizable at all. Presumably all would agree that no one has any greater First Amendment right to "fence" stolen video tapes or books than one does to "fence" *blank* tapes or paper, even though *authorized* book and tape sellers actions are constitutionally protected. Yet the only difference between such a fence and the defendants in these cases is that the fence's motive is financial, while the defendants here seek political gain (or increased ratings) by embarrassing their opponents. Moreover, the Act imposes *no* limit upon defendants' own speech, but is strictly limited to preventing their *misappropriation* of *others'* speech. Thus, as noted, participants in phone calls can disclose their content, the defendants here could have revealed the content if their source was a participant, and they also could report any information if it was independently acquired. *See supra* p. 20 n.6. Thus, the Act's furtherance of the First Amendment interest in protecting private speech plainly outweighs whatever miniscule effect (if any) it has on defendants' expressive activities.

Yet the Third Circuit found that the Act is not sufficiently tailored to accomplish the concededly significant state interest in "maintain[ing] the confidentiality of wire, electronic, and oral communications." *Bartnicki*, 200 F.3d at 125 (quoting Brief for the United States at 33). The court reached this remarkable conclusion only by wholly mischaracterizing the harm that the Act is designed to prevent and the justification offered in support of it. Specifically, the court found that the Act's prohibition on disclosing purloined phone calls is impermissibly overbroad because the United States could not affirmatively prove that the prohibition would eliminate "the demand for intercepted

materials on the part of third parties." *Id.* Consequently, the First Amendment prohibited the Act's disclosure provisions from being applied to persons other than those who had engaged in the initial interception. This analysis is facially wrong on a number of levels.

First, and most important, the ban on disclosure is entirely valid regardless of whether it leads to less eavesdropping, for it directly serves the distinct purpose of ensuring less *dissemination* of communications that have been intercepted. The harm prevented by the Act is the exposure of one's private conversations to unwanted ears. Interception of the phone call exposes the conversation to one pair of ears, but disclosure exposes it to a potentially limitless number. Thus, disclosure is at least as great an invasion of privacy, and has at least an equivalent chilling effect, as the interception in isolation. While the perusal of one's private diary by an intruder is embarrassing and chilling, a far greater chill and invasion occurs if the diary's contents are disclosed over a mass medium of communication to the public as a whole. Thus, as this Court has noted with respect to a related provision of the Act, "contrary to [the Third Circuit's] assertion that the invasion of privacy is over and done with" when the interception is complete, disclosure of the intercepted call "compounds the statutorily prescribed invasion of their privacy." *Gelbard v. United States*, 408 U.S. 41, 51-52 (1972).

Like the Act's exclusionary rule in Section 2515 and like the Court's exclusionary rule for phone calls intercepted in violation of the Fourth Amendment, the Act's nondisclosure requirement rests on the recognition that disclosure creates a harm separate and distinct from the taping of another's call. Specifically, the Act's purpose is to reinforce the speaker's First Amendment right to choose his audience. Disclosure of speech beyond the speaker's selected audience *further* invades his "right to exclude" and further chills his private speech. The *only* way to prevent such forced expansion of the speaker's audience, and the consequent chilling effect, is to prohibit such dissemination. That being so, the Act's disclosure ban

serves a compelling and important purpose regardless of whether it affects the incentives for the initial interception.

The Third Circuit's fundamental error, then, was its assumption that the disclosure restrictions could only be justified as a disincentive for eavesdropping. If this were true, the government could not separately punish even a thief for disclosing the phone call he has intercepted – he could only be punished for the interception. Obviously, punishing the thief for disclosure cannot discourage the interception he has already committed and, as discussed above, the thief has the same First Amendment right to disclose as the defendants here.

Thus, when the harm that the Act was designed to prevent is properly understood, it is clear that a ban on distribution is not only narrowly tailored, it is, in fact, the "least restrictive alternative." *But see Turner*, 512 U.S. at 662 (restriction on speech "need not be the least speech-restrictive means of advancing the Government's interests."); *Ward*, 491 U.S. at 797. In any event, there is nothing to the Third Circuit's notion that the government can prevent eavesdropping as effectively by prohibiting only the raw act of interception as it can when that prohibition is coupled with a disclosure ban. One might as well say the government can effectively combat child pornography by simply preventing the actual filming of children, without being able to stop the pornographer's distribution (at least by anyone other than the person who did the filming). The Court has already rejected such a facially erroneous assertion. *See New York v. Ferber*, 458 U.S. 747, 760 (1982). Eavesdropping is typically done surreptitiously and, if the disclosure ban can only be applied to the thief himself, it can be easily evaded by "laundering" the tape through another. In the *Boehner* case, for example, Mr. Martin could have taped the phone call and handed the tape to Mrs. Martin who, under the Third Circuit's logic, would have an unfettered right to distribute it to the world.

Finally, particularly since the disclosure prohibition is based on precisely the same obvious linkage underlying all laws prohibiting the receipt or distribution of stolen

goods, or money laundering, as well as the holding in *Ferber*, there was no need for Congress to support its "predictive judgment" with empirical studies establishing that linkage. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997). *See Nixon v. Shrink*, 120 S. Ct. 897, 906 (2000). This is particularly true since such specific, empirical proof would be virtually impossible in this context. Such empirical evidence would presumably need to compare the amount of eavesdropping that occurs under laws prohibiting interception alone relative to laws prohibiting both interception and disclosure. But this is not possible since the Act applies everywhere in the United States and has always prohibited both disclosure and interception. Moreover, no one knows how much eavesdropping actually goes on and there were no definitive studies on this question prior to the Act's adoption in 1968 – when, in any event, vastly different technology existed. Thus, the Third Circuit's insistence on "proof" was a fairly transparent effort to facially invalidate any effort to prevent disclosure of illegally-intercepted speech.

The eminently predictable response to the foregoing will be, of course, that the possibility of civil awards for disclosing illegally-intercepted calls will lead to "timidity and self-censorship" by our media guardians and a potential failure to expose "for example, some public officials accepting a bribe" over the phone. *See Bartnicki*, 200 F.3d at 127 (quoting *Florida Star*, 491 U.S. at 535); Mc. Pet. App. 38a (Sentelle, J., dissenting). The short, and complete, answer to these concerns is contained in the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen*, 501 U.S. at 669. *See also Branzburg*, 408 U.S. at 692 (The press has no "freedom to do wrong with impunity" and the right to "state public things and discuss them . . . is subject to the restraints which separate right from wrong-doing.") (citation omitted); *Harper & Row*, 471 U.S. at 557-58. The Act's generally applicable disclosure ban simply denies

the press, and its sources, the ability to exploit the interception of private communications that violate a law of unquestioned constitutional validity. As the *Harper & Row* Court stated in response to a similar argument about press freedom, "[i]n our haste to disseminate the news it should not be forgotten that the Framers intended [protections against outside surveillance of private conversations] to be [an] engine of free expression." 471 U.S. at 558. Freedom of the press does not include any power to trump others' right to free expression by appropriating their speech – copyrighted or private – and presenting it to an unwanted audience.

Fears about a "chilling effect" ring particularly hollow here because the Act contains an explicit *scienter* requirement which immunizes all those without knowledge or reason to know that the communication was illegally intercepted. 18 U.S.C. § 2511(1)(c). This is in stark contrast to *Florida Star*, which involved a strict liability statute and information supplied by the government itself – leading to justifiable concerns that a media outlet naturally relying on government-provided information could unknowingly violate the law. 491 U.S. at 538-39. We note as well that, although the Act has been the unquestioned law for thirty-two years, the media, to say the least, have not been notably more timid during that period in exposing private activities or uncovering public corruption. While it is true that the Act, in an infinitesimal number of cases, may discourage exposure of genuine wrongdoing, the same is true of *every* protection of privacy and private speech – from attorney-client privilege to the Fourth Amendment to the exclusionary rule to the Act's prohibition against *intercepting* private communications. This is the small price we pay for having a private sphere of communication and is what separates us, in a fundamental way, from societies not tolerant of such individual autonomy. Nothing in the First Amendment requires American citizens to surrender this sacred freedom and subject themselves to the Orwellian nightmare of having their most private conversations broadcast over the Nation's airwaves. Indeed, it

would be a perversion of that Amendment to impose such a regime, particularly at a time when new technology (and "evolving" media "ethics") make such intrusions on ever-shrinking private spheres a more concrete reality.[9]

V. The Act, As Applied To Public Officials, Is Constitutional.

Even if all of the foregoing is wrong, the imposition of civil penalties on Representative McDermott would not violate the First Amendment. Unlike the private party respondents, Congressman McDermott, just like the federal judge in *Aguilar*, is a "government official[ ] in [a] sensitive confidential position[ ]" who had access to confidential information as a consequence of that office and took an "oath" to preserve the "confidentiality" of any information so obtained. *Aguilar*, 515 U.S. at 606; Joint Appendix 13, *Boehner v. McDermott*, No. 98-7156 (D.D.C. Apr. 30, 1999) ("Mc. J.A."). Even assuming, then, that "special duties of nondisclosure" may be imposed only on those who voluntarily assume a public trust, this duty may be imposed on Congressman McDermott (or he may be deemed to have "waived" any contrary First Amendment rights) because he is in precisely the same position as the defendant in *Aguilar*.

Aguilar was a federal judge who had learned that a wiretap had been authorized by another judge for the

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[9] Neither *Boehner* nor *Bartnicki* presents a situation where the disclosure at issue was a *republication* of an illegally-intercepted communication that already had been generally made public. We acknowledge that such republication by a newspaper "further down the chain" presents a more difficult case because "the taint of illegality [may be] sufficiently dissipated" and because the government's interest in preserving privacy is diminished, for the reasons reflected in *Florida Star*. Mc. Pet. App. 11a n.7. Such precise line drawing can better be done, however, in an as-applied challenge presenting a concrete factual situation.

telephone of one Abe Chapman, and he informed Chapman of this fact. Under respondents' broad reading of *Florida Star*, Aguilar should have been able to disclose this fact to whomever he pleased, whenever he pleased, totally cloaked in First Amendment immunity. Yet Aguilar was criminally convicted of violating 18 U.S.C. § 2232(c) – the sister provision to the statute (18 U.S.C. § 2511(1)(c)) at issue here – which prohibits disclosure of the fact that a wiretap has been sought or authorized. Aguilar, like Rep. McDermott, challenged the statute, claiming a First Amendment right to disseminate truthful, lawfully obtained information, and the Court unanimously rejected that challenge. *See* 515 U.S. at 606; *id.* at 606-07 (Stevens, J., concurring in part and dissenting in part).

Like Judge Aguilar, Rep. McDermott took an oath of office which precluded disclosure of the relevant information and he has explicitly conceded that he received the tape here only "because of his position as the ranking minority member of the House Committee." Mc. J.A. 138; *see also* Mc. J.A. 151, 159, 160.[10]

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[10] Rep. McDermott swore the following oath as a precondition to his membership on the Ethics Committee: "I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on Standards of Official Conduct, any information received in the course of my service with the Committee, except as authorized by the Committee or in accordance with its rules." *See* Rules of the House Committee on Standards of Official Conduct 7; *see also* Rules of the House of Representatives X cl. 4, § 698(e)(4) (same). Likewise, the rules of the House of Representatives and the House Ethics Committee explicitly provide that "[n]o information . . . received . . . shall be publicly disclosed by any Committee or staff member unless specifically authorized in each instance by a vote of the full Committee." Rules of the House of Representatives X cl. 4, § 698(e)(2)(F). *See also* Rules of the House Committee on Standards of Official Conduct 12. Even assuming *arguendo* Representative McDermott's disclosure was not directly governed by the House confidentiality rules, he

In short, if the Court concludes that the Act is unconstitutional as applied to private parties, it should clarify that the Act is constitutional as applied to government officials, where "restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." *Aguilar*, 515 U.S. at 606.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

MICHAEL A. CARVIN*
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

Counsel of Record

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received the tape in circumstances far closer to his official, confidential duties than those involved with Judge Aguilar's receipt of wiretap information. Judge Aguilar was not involved at all in authorizing the wiretap; rather, he was told about it in a private conservation with the judge who was presiding over the matter. 515 U.S. at 596. This did not matter because "special duties of nondisclosure" may *generally* be imposed on government officials, like the ranking member of the House Ethics Committee, in "sensitive confidential *positions*," regardless of whether they have a specific duty of confidentiality concerning the particular information disclosed. *Id.* at 606 (emphasis added).